No. 91-1671

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

WILLIAM J. MERTENS, ALEX W. BANDROWSKI, JAMES A. CLARKE, and RUSSELL FRANZ,
Petitioners,

v.

HEWITT ASSOCIATES, an Illinois Partnership,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF AMICUS CURIAE OF AMERICAN ASSOCIATION OF RETIRED PERSONS IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*

The American Association of Retired Persons is a non-profit membership organization of approximately 34 million working and retired persons age 50 and older. One of AARP's primary objectives is to promote the economic security of individuals as they age. Through educational and advocacy efforts, AARP seeks to increase the availability, security, equity, and adequacy of public and private pension and health plans.

AARP's members, and other older Americans who depend on private employer-sponsored pension and health

plans subject to the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001 *et seq.*, have a stake in the reversal of the decision below, which holds that individuals who knowingly participate in a breach of trust by a fiduciary have no liability under federal law to the plan participants they harm. The result of the alleged breach in this case, and of respondent's alleged "knowing participation" in the breach, was the insolvency of Petitioners' pension plan. The Pension Benefit Guaranty Corporation assumed responsibility for paying plan benefits, but only to the extent benefits were guaranteed under Title IV of ERISA, *see* ERISA § 4022, 29 U.S.C. § 1322. Because Petitioners' plan benefits exceeded the maximum guarantee amounts, Petitioners lost significant portions of the pensions that they earned during their working lives and on which they depend to support themselves in retirement.

The decision below, which is contrary to the holdings of four other circuit courts of appeals, threatens the security of retired and working Americans' interests in hundreds of thousands of pension and welfare benefit plans subject to ERISA. AARP has a substantial interest in the resolution of the issue, which has a direct and vital bearing on our members' retirement security.

STATEMENT OF THE CASE

AARP adopts Petitioners' Statement of the Case.

SUMMARY OF ARGUMENT

Construing ERISA to authorize a cause of action against a non-fiduciary for its knowing participation in a fiduciary breach is consonant with the language and purpose of the statute. Congress provided for "appropriate equitable relief" under ERISA Section 502(a)(3) and this Court's precedents make clear that the courts may derive that relief from the emerging federal common law. *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 56 (1987). Under trust law principles, with which ERISA "abounds," *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110 (1989), equitable relief can include compensatory damages against a person who knowingly participates in another person's breach of trust. The contrary interpretation of the court below is wrong because it ignores these traditional equity and trust principles and the broad language of Section 502(a)(3).

The decision below also undermines the primary purpose of ERISA to protect the interests of participants by providing appropriate remedies and sanctions. *See* ERISA Section 2(b), 29 U.S.C. § 1001(b). The effect of the court of appeals' holding is to deny participants recourse against those whose improper actions enabled a fiduciary to violate its statutory duties. Reversing the decision below and applying traditional trust rules which impose liability on non-fiduciaries would further ERISA's purposes by preventing and deterring violations of the statute's fiduciary requirements.

ARGUMENT

I. ERISA SECTION 502(a)(3) CREATES FEDERAL JURISDICTION OVER A PARTICIPANT'S CIVIL ACTION AGAINST A PERSON WHO KNOWINGLY PARTICIPATES IN A FIDUCIARY'S BREACH OF TRUST.

Petitioners seek relief against Hewitt Associates, whom Petitioners allege knowingly participated in an ERISA fiduciary's breach of trust. (J.A. 38). Section 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3), provides that a participant may bring a civil action to obtain appropriate equitable relief to redress violations or enforce provisions of ERISA. The statutory question before the Court is thus straightforward: is "equitable relief" under Section 502(a)(3) available against a person who knowingly assists a fiduciary in a breach of the fiduciary's responsi-

bility? The answer, under traditional equity jurisdiction, is that such relief is available.

Ignoring traditional equity principles, the court of appeals held that Congress intended to apply the term "equitable relief" narrowly under ERISA, limiting it to non-compensatory forms of relief. This restrictive interpretation of equitable relief is not only historically inaccurate, but is at loggerheads with the remedial purposes of ERISA. Moreover, four of the six courts of appeals that have considered the question have held to the contrary. *Diduck v. Kaszycki & Sons Contractors, Inc.*, 974 F.2d 270 (2d Cir. 1992); *Whitfield v. Lindemann*, 853 F.2d 1298 (5th Cir. 1988), *cert. denied sub nom. Klepak v. Dole*, 490 U.S. 1089 (1989); *Brock v. Hendershott*, 840 F.2d 339, 342 (6th Cir. 1988); *Lowen v. Tower Asset Management, Inc.*, 829 F.2d 1209, 1220-1221 (2d Cir. 1987); *Thornton v. Evans*, 692 F.2d 1064, 1078 (7th Cir. 1982); *see also Fink v. National Sav. & Trust Co.*, 772 F.2d 951, 958 (D.C. Cir. 1985).[1]

A. ERISA Section 502(a)(3) Embodies Trust Law Principles, Which Recognize A Cause Of Action Against A Person Who Knowingly Participates With A Fiduciary In A Breach Of Trust.

Courts of equity in both England and the United States have historically exercised jurisdiction over trusts. A. Scott & W. Fratcher, *The Law of Trusts* (4th ed. 1989) § 197, at 188. ("Trusts are, and have been since

[1] It is also a view that has been rejected by a number of district courts in other circuits. *See, e.g., Pension Benefit Guar. Corp. v. Ross*, 733 F. Supp. 1005, 1008 (M.D.N.C. 1990); *Pension Fund Local 701 v. Omni Funding Group*, 731 F. Supp. 161, 176-179 (D.N.J. 1990); *Brock v. Gerace*, 635 F. Supp. 563, 566 (D.N.J. 1986); *Donovan v. Schmoutey*, 592 F. Supp. 1361, 1395-1396 (D. Nev. 1984); *Freund v. Marshall & Ilsley Bank*, 485 F. Supp. 629, 641-42 (W.D. Wisc. 1979).

they were first enforced, within the peculiar province of courts of equity."). The remedies utilized by equity courts concerning when trusts are in their purview are thus, by definition forms of equitable relief and are within the power of a federal court to award under ERISA Section 502(a)(3), 29 U.S.C. § 1132(a)(3).

There is no historical dispute concerning whether equity courts could award money damages against a person who knowingly participated in another person's breach of trust.

> Anyone who participates with a trustee in a breach of trust may be held liable in a court of equity to the cestui que trust. If he has received and still holds the trust property or its proceeds, he may be held as constructive trustee thereof; *if he has never received or no longer holds the trust property or its proceeds, he may be held liable in equity for damages.*

Scott, *Participation in a Breach of Trust*, 34 Harv. L. Rev. 454, 454 (1921) (emphasis added). *See, e.g., Blythe v. Flagdale*, 1 Ch. 337, 351-52 (1889); *Blankenship v. Boyle*, 329 F. Supp. 1089, 1112 (D.D.C. 1971); *Gilbert v. El Paso Co.*, 490 A.2d 1050, 1057 (Del. Ch. 1984); *International Community Corp. v. Victory Young*, 486 So. 2d 629 (Fla. Dist. Ct. App. 1986); *Shuster v. North American Mortgage Loan Co.*, 40 N.E. 130, 143 (Ohio 1942). *See also* G. Bogert & G. Bogert, *The Law of Trusts and Trustees* § 901 (2d ed. 1982) (trust "beneficiary, as equitable owner of the trust res has the right that third persons shall not knowingly join with the trustee in a breach of trust."); Scott & Fratcher, *supra*, § 326.5; Restatement (Second) of Trusts § 326 (1959); Note, *Liability of Bank for Aiding Fiduciary in Purchase of Non-Legal Securities*, 47 Yale L.J. 299, 299 (1937) (noting "the firmly-rooted doctrine that anyone knowingly aiding or participating in a breach of trust is jointly and severally liable with the trustee.").

Given the traditionally accepted meaning of equitable relief, the language of Section 502(a)(3) authorizes a participant or beneficiary in an employee benefit plan to bring an action against a person who knowingly participates in a fiduciary's breach of duty under ERISA. "We must give effect to this plain language unless there is good reason to believe Congress intended the language to have some more restrictive meaning." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 97 (1982).

B. The Language And Purpose Of ERISA Support Equitable Relief Against Non-Fiduciaries.

The premise of the decision below is that if money damages were available under Section 502(a)(3), Section 409(a)'s language requiring that fiduciaries "make good . . . any losses to the plan resulting from such breach," 29 U.S.C. § 1109(a), would be rendered superfluous. The Ninth Circuit's limiting construction of Section 502(a)(3) is wrong because the provisions can be read to coexist to provide the full range of equitable relief as Congress intended.

1. *The Ninth Circuit's Artificial Limitation On Equitable Relief Under ERISA Section 502(a)(3) Is Inconsistent With Congressional Intent.*

The object of statutory construction is to determine the intent of the legislature. *See Smith v. Wade*, 461 U.S. 30, 65 (1983). Canons of statutory construction are merely aids in determining the legislature's intent. "No single canon of interpretation can clarify with certainty exactly what the drafters intend." N. Singer, *Sutherland Statutory Construction* § 45.05, at 23 (5th ed. 1992).

The court of appeals, however, with a single-minded focus on one of a myriad of canons of statutory construction interpreted ERISA in a manner demonstrably inconsistent with Congress' intent "to promote the interests of employees and their beneficiaries in employee benefit plans." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90 (1982). Indeed, the Ninth Circuit's opinions in this case and in *Nieto v. Ecker*, 845 F.2d 868 (9th Cir. 1988), are utterly barren of any analysis of statutory purpose. The opinions fail to point to a single expression of statutory purpose in either ERISA or its voluminous legislative history that explains why Congress would want to insulate from liability aiders and abettors of fiduciaries who breach their statutory responsibilities. The result of this single-minded focus is so inconsistent with ERISA's purpose in that it affords "less protection to employees and their beneficiaries than they enjoyed before ERISA was enacted." *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 114 (1989).

ERISA's statement of purpose, its legislative history, and its interpretation by this Court, all stand in stark contrast to the rigid and mechanical approach that the court of appeals used in limiting Section 502(a)(3)'s reach. In ERISA's declaration of policy, Congress stated that ERISA was intended to "protect . . . the interests of participants in employee benefit plans and their beneficiaries, . . . by providing for appropriate remedies, sanctions, and ready access to the Federal courts." 29 U.S.C. § 1001(b). The Ninth Circuit, in contravention of this purpose, would limit available remedies and, as this case so amply demonstrates, deny participants in employee benefit plans recourse in the federal courts to seek redress against parties whose improper actions enabled a fiduciary to violate its statutory duties. The Ninth Circuit's holding is thus at odds with ERISA's congressional declaration of policy.

It is also at odds with ERISA's legislative history. The bill that emerged from conference to become ERISA authorized participants to bring actions for equitable relief. The committee reports state that Congress intended

Section 502(a)(3) to provide "the full range of . . . equitable remedies available in both state and federal courts."[2] As discussed above, equity courts have long granted relief against non-fiduciaries for knowing participation in a trustee's breach. Therefore, interpreting ERISA to limit equitable relief would undermine the protection of employee interests that is at ERISA's core.

Moreover, this Court, reviewing ERISA's legislative history, has found that Congress intended for the federal courts "to develop a federal common law of rights and obligations under ERISA-regulated plans," *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. at 110, quoting *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 56 (1987). This authority includes the fashioning of appropriate equitable relief under ERISA Section 502(a)(3), *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 155 (1985) (Justice Brennan, concurring). *See also* 120 Cong. Rec. S29,942 (daily ed. Aug. 22, 1974) (remarks of Senator Javits, ranking minority member of Senate Labor Committee: Congress "intend[s] that a body of Federal substantive law will be developed by the courts to deal with issues involving rights and obligations under private welfare and pension plans.").[3]

ERISA's legislative history points to the Labor-Management Act as a model for its own enforcement scheme. H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S. Code Cong. & Ad. News 5038, 5109. This Court has instructed that federal common law in the context of the Labor-Management Act involves

> looking at the policy of the legislation and fashioning a remedy that will effectuate that policy. The range of judicial inventiveness will be determined by the nature of the problem . . . . state law, if compatible . . . may be resorted to in order to find the rule that will best effectuate the federal policy.

Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 457 (1957) (citations omitted).

As this Court has noted, ERISA "abounds with the language and terminology of trust law." *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. at 110. ERISA's overriding purpose is to protect the interests of participants in employee benefit plans. ERISA Section 2(b), 29 U.S.C. 1001(b). Therefore, it is natural for courts to turn to trust law for remedies that will enhance the protection of employee interests in pension and welfare plans. *See* 120 Cong. Rec. S29,932 (daily ed. Aug. 22, 1974) (comments of Senator Williams, Chair of the Senate Labor Committee: Congress intended in ERISA "to make applicable the law of trusts."). Such relief is "consonant with the purpose of the Act as declared by Congress and plainly disclosed by its structure." *Gruver v. Commissioner*, 142 F.2d 363, 366 (4th Cir. 1944).

2. *Equitable Remedies Under Section 502(a)(3) Are Available, Irrespective of ERISA Section 409(a).*

The premise of the court of appeals' analysis—that giving full effect to ERISA Section 502(a)(3) would render ERISA Section 409(a) a superfluity—is based on a mistaken understanding of the statute and how its enforcement provisions were constructed by Congress. The separate provisions do not limit the relief available to participants, but co-exist to provide a full range of remedies under ERISA.

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[2] S. Rep. No. 127, 93d Cong., 2d Sess. 35, *reprinted in* 1974 U.S. Code Cong. & Admin. News 4838.

[3] The Ninth Circuit has itself observed that the congressional invitation to develop a body of common law granted "authority to the courts to develop principles governing areas of the law regulating employee benefit plans that had previously been the exclusive province of state law." *Menhorn v. Firestone Tire & Rubber Co.*, 738 F.2d 1496, 1499 (9th Cir. 1984).

A plausible explanation for the interplay between Sections 409 and 502(a)(3) is evident from the statute itself. Part 4 of Title I of ERISA establishes standards for the behavior of fiduciaries. Section 409(a), which appears in this part of ERISA, mandates monetary awards against breaching fiduciaries who cause loss to a plan. By specifying the types of relief available against fiduciaries under Section 409, Congress established a floor of relief for specific cases, irrespective of the relief available under the federal common law.

The provision of relief against fiduciaries under Section 409(a), however, does not mean that Congress intended to preclude courts from awarding similar remedies against non-fiduciaries under Section 502(a)(3). In Section 502(a)(3), Congress gave the courts the authority to determine the type and scope of equitable relief necessary to effectuate ERISA's purposes. *See Ingersoll-Rand Co. v. McClendon*, 111 S. Ct. 478, 486 (1990). Thus, in appropriate situations, the federal common law may provide for relief that meets the floor of specified remedies under Section 409(a). This construction of ERISA Sections 502(a)(3) and 409(a) allows both provisions to coexist, consistent with the principle of giving effect to all of a statute's provisions. *See, e.g., Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979).

II. OBRA'S CREATION OF A CIVIL PENALTY AGAINST NON-FIDUCIARIES WHO KNOWINGLY PARTICIPATE IN A BREACH OF TRUST MAKES CLEAR THAT COURTS MAY ASSESS PENALTIES AGAINST SUCH NON-FIDUCIARIES.

In 1989, Congress enacted the Omnibus Budget Reconciliation Act of 1989 (OBRA), Pub. L. No. 101-239, § 2101, 103 Stat. 123, which among other provisions, added a new Section 502(*l*), 29 U.S.C. § 1132(*l*) to ERISA. Section 502(*l*) provides that

> In the case of (A) any breach of fiduciary responsibility under (or other violation of) part four by a fiduciary, or (B) any knowing participation in such a breach or violation by any other person, the Secretary shall assess a civil penalty against such fiduciary or other person in an amount equal to 20 percent of the applicable recovery amount.

ERISA § 502(*l*)(1), 29 U.S.C. § 1121(*l*)(1) (emphasis added).

The term "applicable recovery amount," in turn, is defined as

> . . . any amount which is recovered from a fiduciary *or other person* with respect to a breach or violation described in paragraph (1)—pursuant to any settlement agreement with the Secretary, or (B) ordered by a court to be paid by such fiduciary *or other person* to a plan or its participants and beneficiaries in a judicial proceeding instituted by the Secretary under subsection (a)(2) or (a)(5).

ERISA § 502(*l*)(2), 29 U.S.C. § 1132(*l*)(2) (emphasis added).

Thus, Section 502(*l*) imposes an award of civil penalties when the Secretary recovers damages under Section 502(a)(5), 29 U.S.C. § 1132(a)(5). Section 502(a)(5) authorizes the Secretary to bring a civil action "to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter." Thus, Congress premised the civil penalty under Section 502(*l*) on the existing availability of money damages as a form of "equitable relief" against a person who knowingly participated in a fiduciary's breach of trust.[1]

[1] In 1989, four of the five circuits that had considered the issue had held that a participant could bring a civil action for money damages against a person who knowingly participated in a fidu-

In the case now before the Court, the court of appeals rejected this apparent confirmation of the statute's reach. The court of appeals held that Section 502(*l*) "applies to the Secretary only, not to plan participants." (J.A. 43.) Based on this construction, the court below reasoned that only the Secretary may obtain make-whole relief against a non-fiduciary.

Section 502(*l*), however, did not, as the court of appeals apparently believes, create a new civil remedy under which the Secretary could obtain monetary relief for damages to the plan. Rather, it tacked on a civil penalty to damages already recoverable by the Secretary under Section 502(a)(5), which was not amended. Since the relevant language of Sections 502(a)(5) and (a)(3) is identical, the inescapable conclusion is that Section 502(a)(3) also authorizes make-whole relief that would have been granted by a court of equity. *See Estate of Cowart v. Nicklos Drilling Co.*, 112 S.Ct. 2589, 2596 (1992) ("identical terms within an Act bear the same meaning.").[5]

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ciary's breach of duty. *Whitfield v. Lindemann*, 853 F.2d 1298 (5th Cir. 1988), *cert. denied sub nom. Klepak v. Dole*, 490 U.S. 1089 (1989); *Brock v. Hendershott*, 840 F.2d 339, 342 (6th Cir. 1988); *Lowen v. Tower Asset Management Inc.*, 829 F.2d 1209, 1220-1221 (2d Cir. 1987); *Thornton v. Evans*, 692 F.2d 1064, 1078 (7th Cir. 1982). Another circuit suggested in dictum its agreement. *Fink v. National Sav. & Trust Co.*, 772 F.2d 951, 958 (D.C. Cir. 1985). Moreover, most district courts that had considered the issue without the benefit of guidance from a court of appeals also agreed. *See* note 1, *infra*.

[5] The court of appeals also reasoned that Congress failed to expressly overrule its earlier holding in *Nieto v. Ecker*, 845 F.2d 868 (9th Cir. 1988) when Congress enacted Section 502(*l*). But *Nieto* and Section 502(*l*) cannot coexist. ERISA Section 502(*l*) could not be given effect against non-fiduciaries unless Section 502(a)(3)'s grant of equitable relief permitted a finding of liability against a person who knowingly participates in a fiduciary breach. The Ninth Circuit's view that Congress acquiesced by not explicitly rejecting its holding in *Nieto* is thus seriously misguided. *See* H.R. Rep. No. 247, 101st Cong., 1st Sess. 77-78, *reprinted in* 1989 U.S. Code Cong. & Admin. News, 1906, 1969-1970.

III. RECOGNITION OF A REMEDY AGAINST A NON-FIDUCIARY IS CONSISTENT WITH THIS COURT'S HOLDING IN *MASSACHUSETTS MUTUAL INSURANCE CO. v. RUSSELL*.

The court of appeals in the instant case and in *Nieto* opined that granting relief against a person for knowing participation in a fiduciary breach would violate this Court's holding in *Massachusetts Mutual Ins. Co. v. Russell*, 473 U.S. 134, 145-146 (1985). In *Russell*, this Court rejected an invitation to find a private right of action for extra-contractual damages implied in ERISA. The Court observed that

> The six carefully integrated civil enforcement provisions found in § 502(a) of the statute as finally enacted . . . provide strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly.

Russell, 473 U.S. at 146 (emphasis in original).

Russell makes clear that the federal courts will not imply remedies that Congress did not expressly include in Section 502(a). Petitioners in this case have not, however, asked this or any other court to imply a remedy that Congress did not include in the statute. Section 502(a)(3) expressly provides for "equitable relief," which traditionally has included damages for knowing participation in a fiduciary's breach. Certainly it is within the authority that Congress granted to the federal courts to find that such a remedy remains an appropriate form of "equitable relief" under ERISA.

CONCLUSION

For the foregoing reasons, AARP respectfully asks the Court to reverse the holding of the court below and to find that non-fiduciaries are liable under ERISA for knowing participation in a fiduciary breach.

Respectfully submitted,

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